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RECEIVED
COURT OF CRIMINAL APPEALS
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DEANA WILLIAMSON, CLERK

July 9, 2019

Ms. Deana Williamson, Clerk
Texas Court of Criminal Appeals
P.O. Box 12308
Austin, Texas 78711

Re: *Victor Ortiz Gonzalez v. State*
No. PD-0572-19

Dear Ms. Williamson:

The State filed a petition for discretionary review in this case on June 10, 2019. Please consider this Appellant's response to that petition.

On May 9, 2019, the Second Court of Appeals reversed Appellant's conviction, holding that he was egregiously harmed by a court's charge which impermissibly instructed the jury that he could be guilty of recklessly causing bodily injury – when he was indicted for intentionally or knowingly doing so. *See Gonzalez v. State*, No. 02-18-00179-CR, 2019 WL 2042573 (Tex. App.—Fort Worth May 9, 2019, pet. filed) (unpublished).

In its petition, the State argues that because reckless assault is a lesser included offense of intentional assault, Appellant wasn't harmed. PDR at 14-

15. First, the State’s proposed harm analysis would swallow the very rule at issue. *Every* case in which the trial court instructs the jury on an un-pled reckless mental state will be, in essence, a lesser included offense of the charged conduct – or more precisely, a degree of lesser culpable conduct. Second, and more important, this sort of analysis was specifically rejected by this Court in *Reed v. State*, 117 S.W. 260, 264 (Tex. Crim. App. 2003): “However, because neither party requested a lesser included offense jury instruction and the lesser included offense issue was not raised at trial, we will not decide this case based on an issue that was not presented to the trial court or preserved for appeal.”

The State seeks to distinguish *Reed* by remarking that the indictment in Appellant’s case contained the “specific acts relied upon to constitute his reckless conduct” while the indictment in *Reed* did not. State’s PDR at 15 n.3. The State does not further explain this. Though the indictment alleged acts constituting forbidden conduct (“striking” the officer’s car with Appellant’s car, “pinning” the officer, CR 5), it fails to allege the acts or circumstances demonstrating that Appellant’s conduct was committed recklessly. *See State v. McCoy*, 64 S.W.3d 90, 93-94 (Tex. App.—Austin 2001, no pet.).

Without coming out and clearly saying so, the State is asking this Court to overrule *Reed*. There is no reason for this, and this Court should decline the

State's invitation to do so. Accordingly, the State's petition for review should be refused.

Respectfully submitted,

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By: /s/ Robert K. Gill

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